NTSB Order No.
EM-58

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 22nd day of March 1977.

OWEN W. SILER, Commandant, United States Coast Guard,

v.

PATRICK D. GILLMAN, Appellant.

Docket ME-59

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming the suspension of his towing vessel operator's license No. 04805.[1] The Commandant also sustained findings of misconduct in appellant's navigation of a tug and barge underway on Lake Erie for a nighttime voyage between Marblehead, Ohio, and Huron, Ohio.[2]

Appellant had appealed to the Commandant (Appeal No. 2066) from the initial decision of Administrative Law Judge Francis X. J. Coughlin, issued at the conclusion of a full evidentiary hearing.[3] Throughout the proceedings, appellant has been represented by counsel.

The law judge found that on July 26, 1975, appellant was the operator in charge of the tug SACHEM with a fully loaded barge, THE CLYDE, in tow astern; that he proceeded on the Lake voyage at 2:40 a.m. without having navigation lights displayed on the barge: that 15 or 20 minutes later a small cabin cruiser became "hung up" on the 500-foot towline between the vessels and slid back along the

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[1]The appeal is authorized by 49 U.S.C. 1903(a)(9)(b).

[2]46 U.S.C. 405(b) provides that towing vessels "shall, while underway, be under the actual direction and control of a person licensed ... to operate in the particular geographic area...." Appellant's license qualifies him for waters on which the Great Lakes navigation rules are applicable (33 U.S.C. 241-295).

[3]Copies of the decisions of the Commandant and the law judge are attached.

line until it collided with the oncoming barge; that four of the six occupants of the cruiser lost their lives; and that the presence of one of the survivors on the barge was not discovered aboard the SACHEM until the towline was shortened when the vessels were approaching the harbor at Huron. The law judge concluded that appellant had violated 33 CFR 90.19, a regulation prescribing lights to be carried on "canal boats" towed astern pursuant to Great Lakes Rule 7 (33 U.S.C. 256) and that he wrongfully failed to comply with the requirements to keep a proper lookout in Rule 28 thereof (33 U.S.C. 293). He thereupon imposed a suspension of appellant's license and seaman documents for 3 months in conjunction with a probationary suspension for 6 months.[4]

The Commandant, on review, modified the initial decision in holding that appellant violated Rule 6, requiring that "any vessel being towed shall carry side lights," rather than the regulation implementing Rule 7; that no statute or regulation required the stationing of a lookout, but this was nevertheless a "well-established rule of navigation;" and that appellant was "guilty of failure to maintain an adequate lookout under the circumstances." He also vacated the order as it applied to appellant's document while affirming it with respect to his license.

In his brief on appeal, appellant contends that (1) the specifications of misconduct did not conform to regulatory requirements and failed to apprise him of the offenses charged; (2) there is no requirement for display of lights on barges towed on the Great Lakes; (3) there was no requirement for placement of lights on the barge in this instance because of special circumstances; and (4) there was no lookout failure "since the cruiser that was to be seen was indeed actually seen." Counsel for the Commandant has filed a reply brief urging our affirmance of the sanction.[5]

Upon consideration of the parties' briefs and the entire record, the Board concludes that the findings of the law judge are supported by substantial evidence which was both probative and reliable, and we adopt those findings as our own. The conclusions

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[4]The latter suspension would be enforced only in the event of a further charge under 46 U.S.C. 239 being proved against appellant for acts committed during the 3-month actual suspension or the ensuing 15-month probation periods.

[5]Appellant also filed a response to the Commandant's reply brief containing further argument on his first contention. This has been considered as a supplementation of appellant's brief.

of the law judge and the Commandant are affirmed with modification herein. Moreover, we agree that the sanction is warranted for appellant's misconduct under the circumstances of this case.

Appellant's argument concerning the pleadings is founded on the assertion that his hearing before the law judge was a quasi-criminal proceeding. He cites Fredenberg v. Whitney, 240 F. 819 (W. D. Wash. 1917) and Benson v. Bulgar, (9 Cir. 1920), which held that the sanctioning provisions of 46 U.S.C. 239, as originally enacted in section 4450 of the Revised Statutes, are penal in nature. These precedents are anomalous in light of subsequent judicial precedents which are more authoritative. A Supreme Court decision in 1938 described the revocation of licenses generally as a sanction "characteristically free of the punitive criminal element."[6] The remedial nature of suspension and revocation orders has since been recognized in a number of Federal court decisions.[7] Clearly, the objective of present-day orders issued pursuant to 46 U.S.C. 239 is not to penalize the license holder for commission of an offense against the law. It is evident from the Commandant's regulations, authorized "to secure the proper administration" of section 239,[8] that proceedings against maritime licenses are indicated chiefly to maintain the standards of competence and conduct essential for safety of life and property at sea.[9] Consistent with this declared purpose, neither criminal procedures nor penal sanctions are involved in this case.

Appellant claims that the specifications must contain the specific statutory or regulatory provisions under which he is charged. We disagree. Misconduct under 46 U.S.C. 239 includes the breach of any rule under the general maritime law or standard of conduct customarily observed by mariners in the interest of safe navigation.[10] Here, the Great Lakes navigation rules were cited in the specifications as a general body of law requiring that there be navigation lights displayed on the barge and that a lookout be stationed on the tug during a voyage on Lake Erie. Appellant was apprised at the outset of the hearing that the specific provisions

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[6]Helvering v. Mitchell,. 303 U.S. 391, 399, 58 S. Ct. 630, 82 L. Ed. 917, 922.

[7]See cases collected in 1 Davis, Administrative Law Treaties §2.13; Kent v. Hardin, 425 F. 2d 1346, 1349 (5 Cir. 1970).

[8]46 U.S.C. 239(j).

[9]46 CFR 5.01-15,-20.

[10]46 CFR 5.05-17(b)

were Rule 7 and 33 CFR 90.19 pertaining to lights and Rule 28 on the lookout issue (Tr. 10-11). It is apparent that he was given timely notice of the matters of fact and law being asserted by the Coast Guard as required by the Administrative Procedure Act.[11] We find that the specifications complied with regulatory requirements[12] and there is no showing that appellant was either misled or surprised concerning the issues actually litigated. His first contention is therefore rejected.

Appellant's next contention concerns the reference to "canal boats" in 33 CFR 90.19. The term is derived from Great Lakes Rule 7 which provides that lights for canal boats shall be regulated by the Commandant of the Coast Guard. If they are towed astern, the applicable regulation is 90.19; if pushed ahead, it is 90.19a. The latter section defines the term as including "barges, scows, and other craft of nondescript type." Although section 90.19 contains no similar definition, we agree with the law judge that the two regulations are in pari materia and should be construed together (I.D. 3-6). It follows that we regard section 90.19(a)(1) as requiring lights aboard THE CLYDE for the voyage in question, consisting of "a green light on the starboard side, a red light on the port side and a small bright white light aft." In addition, Great Lakes Rule 6, requiring "any vessel being towed" to carry the identical system of lights, was obviously applicable to THE CLYDE in this case, as held by the Commandant,[13] Finally on this issue, the law judge reflected general maritime law in finding that, although towing lights were displayed on the SACHEM, appellant breached an equivalent duty by towing the unlighted barge "in the path of other vessels, at night."[14] In our view, these holdings are

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[11]5 U.S.C. 554(b)(3). See Commandant v. Reagan, 1 N.T.S.B. 2193, 2195, (1970).

[12]The facts constituting each offense, the date and place of their commission, and the jurisdictional basis for proceeding against appellant's license, (viz., 46 U.S.C. 239 and regulations promulgated thereunder) were set forth in the Coast Guard's pleading, as required by 46 CFR 5.05-17(b).

[13]Appellant's argument that he cannot be found guilty of violating this statute since it was not alleged in the specifications is also founded on the Fredenberg case, supra. It is another aspect of the penal conception of this proceeding which we have rejected as outmoded if not obsolete.

[14]The Ernest A. Hamill, 100 F 509, 511 (N.D. Wash. 1900). See cases collected in Griffin, The American Law of Collision § 91.

sufficient to show the existence of the requirement for lights aboard barges towed on the Great Lakes.

The third contention is that 25-mile winds and 4 to 6-foot seas during the voyage were "special circumstances" which excused the failure to place lights on the barge. We may disregard the Commandant's finding that "Once the tug and barge were clear of the slip [at Marblehead], the immediate dangers... terminated" (C.D. 7). The time in question was when the barge was still berthed at the slip. As found by the law judge: "There was no explanation as to why the portable lights [carried] aboard the SACHEM [were] not passed by means of a heaving line to the [SACHEM's crewmen who were] on the barge at the time the towing brindle had been passed" (I.D. 19). The same weather conditions prevailed at this time. However, the record does not indicate that the task of passing the portable lights to crewmen of the barge presented an immediate threat to safety. If such were the case and the crewmen had returned to the tug without placing the required lights on the barge, then the voyage should have been delayed until weather conditions permitted them to do so. We perceive no circumstances in which the performance of this task before undertaking the voyage would be excused.

The absence of a lookout on the SACHEM is not a statutory fault. In accordance with Rule 28, appellant was nonetheless responsible for the "Consequences... of any neglect to keep a proper lookout... [as] required by the ordinary practice of seamen, and by the special circumstances of this case." Ordinarily, the lookout is stationed for purposes of forward observation.[15] However, the obligation to keep a proper lookout "involves vigilance in every direction in which danger may be expected to arise...."[16] Appellant's argument that the lookout function was being performed is based on the testimony that a cabin cruiser was sighted crossing between the tug and barge about 20 minutes after departing from Marblehead (Tr. 30). It was also testified that this cruiser proceeded safely on its course over the slackened towline (Tr. 50-3). Although coincident in time, no one aboard the SACHEM observed a cabin cruiser colliding with the barge, an event which is unquestionably established by the fact that a survivor climbed on the barge after the collision and remained there unobserved for almost the entire 2-hour voyage to Huron (Tr. 28). Moreover, this was a chance sighting whereas the lookout function required constant vigilance.

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[15]Commandant v. Chapman, N.T.S.B. Order No. EM-56, adopted January 25, 1977, p.6.

[16]Griffin, supra, § 108.

Circumstances attending this towing operation presented grave risks to other vessels "properly on the nautical road" (I.D. 19). Considering the 500-foot separation between the tug and barge, the difficulty of checking the forward momentum of the barge laden with stone (Tr. 54) in an emergency, during a voyage at night with the barge both unlightened and unmanned, we have no hesitancy in finding that a stern lookout was required on the SACHEM.[17] Yet no lookout was posted either forward or astern (Tr. 28-9). It is undisputed that three of the four persons who perished actually survived the collision and were clinging to wreckage parts in the water (Tr. 127). The fact that these survivors were not rescued is one of the consequences of the failure to station a competent lookout astern during the voyage. In assessing sanction, we regard the suspension order as excessively lenient for the acts of misconduct proved.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The order of suspension entered by the law judge, as modified by the Commandant, be and it hereby is affirmed.

TOOD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

[17]The precaution taken of training a floodlight and searchlight on the barge was no adequate substitute, particularly in view of the law judge's finding that "these lights illuminated the water about 20 or so feet aft of the tug, but not the barge at the time of the casualty" (Tr. 96, I.D. 20).